SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 373

MARTIN LUDWIG COHNSTAEDT, PETITIONER,

vs.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES DEPARTMENT OF JUSTICE

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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[fol. 1]

IN THE DISTRICT COURT OF BARTON COUNTY, KANSAS

No. 480

In the Matter of Petition for Naturalization Filed by MARTIN LUDWIG COHNSTAEDT

NOTICE OF APPEAL TO THE SUPREME COURT—Filed August 21, 1948

To the Immigration and Naturalization Service, United States Department of Justice, 819 United States Courthouse, Kansas City 6, Missouri

Please take notice that the Petitioner, Martin Ludwig Cohnstaedt, appeals from the judgments of this Court made on the 18th day of August, 1948, overruling the Petitioner's Motion for Judgment According to the Court's Conclusions of Law and Finding of Facts; the Petitioner's Motion for a New Trial, and from the order of the Court on June 21, 1947, refusing to permit the Petitioner to take the oath of naturalization.

Martin L. Cohnstaedt, by (S.) Laurence S. Holmes, his Attorney of Record, 209 Orpheum Building, Wichita, Kansas.

[File endorsement omitted.]

[fol. 2] IN THE DISTRICT COURT OF BARTON COUNTY, KANSAS

No. 480

In the Matter of Petition for Naturalization Filed by MARTIN LUDWIG COHNSTAEDT

PROOF OF NOTICE OF APPEAL

STATE OF KANSAS,
County of Sedgwick, ss:

Comes now the Affiant, Laurence S. Holmes, and upon oath states that, acting on behalf of the Petitioner, Martin Ludwig Cohnstaedt, he caused to be deposited in the United

States Mail today, properly addressed and stamped, a copy of the Notice to Appeal marked Exhibit "A", attached hereto, and addressed the same to the Immigration and Naturalization Service, United States Department of Justice, 819 United States Courthouse, Kansas City 6, Missouri, that being the last known address to the Affiant of the Respondent, and that it is located outside of the State of Kansas.

Further Affiant saith not.

(S.) Laurence S. Holmes, Affiant.

Signed, subscribed, and sworn to before me, a notary public, this 19th day of August, 1948. (S.) Mozelle Humphrey, Notary Public. (Seal.) My commission expires April 8, 1941.

[File endorsement omitted.]

[fol. 3] In the District Court of Barton County, Kansas

No. 480

In the Matter of Petition for Naturalization Filed by Martin Ludwig Cohnstaedt

Journal Entry on Motions for Judgment, New Trial and Attorney's Fee—Filed August 18, 1948

Now on this 18th day of August, 1948, upon proper notice to the U. S. Department of Justice, Immigration and Naturalization Service, 819 U. S. Courthouse, Kansas City, Mo., came on for hearing the Petitioner's motion for judgment in accordance with the Court's findings of fact and conclusion of law, and the Petitioners motion for a new trial.

The Court, after hearing the arguments of Laurence S. Holmes, attorney representing the Petitioner and the arguments of C. J. Long, who was present representing the United States Department of Justice, Immigration and Naturalization Service finds that said motions should be and the same are hereby overruled.

The Court then proceeded to hear the motion of Laurence S. Holmes for counsel fees. After hearing the arguments of both parties the Court finds that Laurence S. Holmes

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should be allowed an attorneys fee of $100 in addition to the statutory fee of $25 for his extended legal services rendered the Petitioner in the Barton County District Court of Kansas. The Court hereby approves said fee with the proviso that this shall not be intended to cover any services of an appellate nature in superior courts.

(S.) Roy J. McMullen, Judge of the District Court.

O. K. (S.) C. J. Long, of the Immigration and Naturalization Service of the United States Department of Justice, Examiner.

[fol. 4] (S.) Laurence S. Holmes, Attorney for Petitioner Martin Ludwig Cohnstaedt.

[File endorsement omitted.]

Certificate of Copy

STATE OF KANSAS,
Twentieth Judicial District,
Barton County, ss:

I, A. J. Bortz, Clerk of the District Court of the Twentieth Judicial District of the State of Kansas, sitting within and for the County aforesaid, do hereby certify the above and foregoing to be a true, full and complete copy of papers in the case entitled In the Matter of Petition for Naturalization filed by Martin Ludwig Cohnstaedt, No. 480, in the therein entitled cause, as the same remains on file and of record in my office.

Witness my hand, and the seal of said court, affixed at my office in Great Bend, this the 11th day of September A. D. 1948.

A. J. Bortz, Clerk, District Court, by —— ——, Deputy. (Seal.)

[fols. 5-6] IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 37531

In the Matter of the Petition of MARTIN LUDWIG COHNSTAEDT for Naturalization

Appeal from the District Court of Barton County, Kansas,

The Honorable Roy J. McMullen, Judge

Abstract of Record

ABSTRACT OF PLEADINGS

The Petition filed by Martin Ludwig Cohnstaedt in Naturalization case No. 480 in the District Court of Barton County, Kansas, alleged: that Martin Ludwig Cohnstaedt resided at 434 North Broadway, Sterling, Kansas, that he was twenty-nine years of age, having been born on October 12, 1917, at Frankfurt-am-Main, Germany, (Prussia), and stated that his present nationality was German. It alleged further that he was married to Rebecca Jane Boone on October 14, 1943, at Lumberton, Robeson County, North Carolina, disclosed that one child had been born named [fol. 7] William Martin Cohnstaedt on March 10, 1945, at Charlottesville, Virginia, and that said child was residing with the Petitioner at Sterling, Kansas. The Petition further disclosed that the Petitioner's last place of foreign residence was in England, that he made lawful entry into the United States at New York on April 27, 1937, having landed on the SS "Normandie".

The Petition further declared "It is my intention in good faith to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which at this time I am subject or citizen, and it is my intention to reside permanently in the United States; I am not, and have not been for the period of at least 10 years immediately preceding the date of this petition, an anarchist; nor a believer in the unlawful damage, injury, or destruction of property, or sabotage; nor a disbeliever in or opposed to organized government; nor a member of or affiliated with any organization or body of persons teaching disbelief in or opposition to organized govern-

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ment; I am able to speak the English language; and I am, and have during all of the periods required by law, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States."

The Petition further disclosed that the Petitioner had resided since August 27, 1946, at 434 North Broadway, Sterling, Kansas and that a prior Petition for naturalization had been filed on March 20, 1945, at Charlottesville, Albemarle County, Virginia, and there dismissed for want of prosecution.

[fol. 8] The Petition concluded with the following language: "I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, that the same are true to the best of my own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters I believe them to be true, and that this petition is signed by me with my full, true name, So Help Me God."

Attached to the Petition was the joint Affidavit of two witnesses, to-wit: Rebecca Jane Cohnstaedt, wife of the Petitioner, and Mrs. Helen Strickler, a housewife, residing in Sterling, Kansas. The Affidavit stated that to the personal knowledge of the Affiants the Petitioner had resided immediately preceding in the United States since the last date mentioned, and that they had personal knowledge the Petitioner was then and had been during all such periods of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of United States, and in their opinion was in every way qualified to be admitted a citizen of the United States.

The Petition was filed in the District Court of Barton County, Kansas, on May 13, 1947. The Petitioner was notified by one M. F. Lence, of the Immigration and Naturalization Service of the United States Department of Justice, that the Naturalization Examiner, found, after the designated administrative hearings, that the Petitioner had "failed to establish attachment to the principles of the Constitution and favorable disposition toward the good order and happiness of the United States during the period required by law."

[fol. 9] The Petitioner demanded a formal hearing before the Naturalization Court of Barton County, Kansas, which hearing was held on November 18, 1947, in the District Court of Barton County, Kansas. At that time, a formal recommendation that the Petition of the Petitioner, Martin Ludwig Cohnstaedt, be denied over the signature of Michael McCaul, a U. S. Deputy Naturalization Examiner, was entered. The Court proceeded to hear the testimony of the Petitioner and his witnesses on that date. This testimony begins on p. 8 of the Abstract. The matter was briefed to the trial Court and on February 28, 1948, the following Decision of the Court was entered:

DECISION OF FEBRUARY 28, 1948

"This matter came on before the court on the 18th day of November, 1947, on the Petition of Martin Ludwig Cohnstaedt, for Naturalization, such petition being opposed by the U. S. Naturalization Service on the ground that the Petitioner had not established attachment to the principles of the Constitution and favorable disposition toward the good order and happiness of the United States during the period required by law.

"The petitioner appeared in person, and by his attorney, Laurence S. Holmes, of Wichita, Kansas, and the U. S. Naturalization Service appeared by Michael McCaul, Examiner.

"Thereupon, said Petitioner introduced his evidence, and the matter was argued to the Court by counsel and the Examiner and the Court gave the Petitioner leave to file a Brief.

"Now, on this 28th day of February, 1948, the Court, having heard the argument of counsel, having read the transcript, of the proceedings, and the brief of Petitioner, and being fully advised in the premises, finds that under the authority of *Girouard v. U. S.*, 328 [fol. 10] U. S. 61, 66 Sup. Ct. Rep. 826, and other citations in the Brief of the Petitioner, that said Petitioner should be admitted to citizenship of the United States, and that upon said Petitioner taking the oath as required by law, said Petitioner will be admitted to citizenship."

(Signed) Roy J. McMullen, Judge of the District Court of Barton County, Kansas.

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Later a Motion for Judgment in the above entitled case was filed on June 21, 1948, another Motion for Judgment in Accordance with the Court's Finding of Facts and Conclusions of Law was filed on June 21, 1948. On June 23, 1948, the Court entered another Order denying the Petition for Naturalization. No reasons were given.

Because of the denial of the Petition the Court refused to administer the oath of allegiance as required by the Nationality Act of 1940. A Motion for a New Trial was filed on June 23, 1948 by the Petitioner Appellant, the reasons set forth are as follows:

"(1) Because of abuse of discretion of the Court;

"(2) Erroneous rulings of the Court;

"(3) That the decision was given under the influence of passion or prejudice;

"(4) That the decision is in part or in whole contrary to the evidence."

On August 18, 1948, the Motion for a New Trial was argued and the Motion for Judgment was argued, and the Court made the following Journal Entry:

[fol. 11] "Now on this 18th day of August, 1948, upon proper notice to the U. S. Department of Justice, Immigration and Naturalization Service, 819 U. S. Courthouse, Kansas City, Mo., came on for hearing the Petitioner's motion for judgment in accordance with the Court's findings of fact and conclusions of law, and the Petitioner's Motion for a New Trial.

"The Court, after hearing the arguments of Laurence S. Holmes, attorney representing the Petitioner and the arguments of C. J. Long, who was present representing the United States Department of Justice, Immigration and Naturalization Service finds that said motions should be and the same are hereby overruled.

"The Court then proceeded to hear the motion of Laurence S. Holmes for counsel fees. After hearing the arguments of both parties the Court finds that Laurence S. Holmes should be allowed an attorneys fee of $100.00 in addition to the statutory fee of $25.00 for his extended legal services rendered the Petitioner in the Barton County District Court of Kansas. The Court hereby approves said fee with the proviso that

this shall not be intended to cover any services of an appellate nature in superior Courts."

(Signed) Roy J. McMullen, Judge of the District Court.

O. K. (Signed) C. J. Long of the Immigration and Naturalization Service of the United States Department of Justice, Examiner.

(Signed) Laurence S. Holmes, Attorney for Petitioner, Martin Ludwig Cohnstaedt.

[fol. 12] On August 20, 1948, a Notice of Appeal to the Supreme Court was filed with the clerk of the Barton County District Court, a copy of which follows:

NOTICE OF APPEAL TO THE SUPREME COURT—Filed August 20, 1948

To the Immigration and Naturalization Service, United States Department of Justice, 819 United States Courthouse, Kansas City 6, Missouri:

Please take notice that the Petitioner, Martin Ludwig Cohnstaedt, appeals from the judgments of this Court made on the 18th day of August, 1948, overruling the Petitioner's Motion for Judgment According to the Court's Conclusions of Law and Finding of Facts; the Petitioner's Motion for a New Trial from the order of the Court on June 23, 1947, refusing to permit the Petitioner to take the oath of naturalization.

Martin L. Cohnstaedt, by Laurence S. Holmes, his attorney of Record, 209 Orpheum Building, Wichita, Kansas.

On August 20, 1948, Proof of Notice of Appeal was filed in the Barton County District Court, a copy of which follows:

[fol. 13] PROOF OF NOTICE OF APPEAL

STATE OF KANSAS,
County of Sedgwick, ss.

Comes now the Affiant, Laurence S. Holmes, and upon oath states that, acting on behalf of the Petitioner, Martin Ludwig Cohnstaedt, he caused to be deposited in the United

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States Mail, properly addressed and stamped, a copy of the Notice to Appeal marked Exhibit "A", and attached hereto, and addressed the same to the Immigration and Naturalization Service, United States Department of Justice, 819 United States Courthouse, Kansas City 6, Missouri, that being the last known address to the Affiant of the Respondent, and that it is located outside of the State of Kansas.

Further Affiant saith not.

Laurence S. Holmes, Affiant.

Filed Aug. 20, 1948.

Verification

My commission expires:

The Notice of Appeal and Journal Entry of Judgment was acknowledged by the Clerk of the Supreme Court of Kansas on September 13, 1948. A cost deposit was filed within thirty days.

Direct examination.

By Mr. Holmes:

Q. State your name to the court.
A. Martin Ludwig Cohnstaedt.
[fol. 14] Q. Where were you born, Mr. Cohnstaedt?
A. Frankfurt-am-Main, Germany.
Q. What year?
A. 1917.
Q. You are a male?
A. Yes.
Q. Color; race?
A. Considered white.

Mr. Holmes: I assume you will stipulate as to his physical description?

Mr. McCaul: All of this, of course, is of record, and in the court.

Mr. Holmes: It isn't necessary to go all over that.

Q. Now, Mr. Cohnstaedt, will you tell the court your age when you emigrated from Germany?

A. Yes, Mr. Holmes, I left Germany in 1934 and went to England; lived in England for three years, and emigrated from England to this country.

Q. In what year?

A. In 1937.

Q. Did your family emigrate from Germany about 1934?

A. My father did.

Q. What was your father's occupation?

A. He was a journalist.

Q. What was the occasion for his leaving the country?

A. He had left the country in 1933 at the occasion of the accession — Hitler to power, the downfall of the German republic.

[fol. 15] Q. And he proceeded to get his family out of the country as soon after that as he could?

A. Yes, sir.

Q. Now, when did you say you came to the United States?

A. In April, 1937.

Q. At that time, you were twenty years old, I believe?

A. Yes, sir.

Q. Where did you reside at that time?

A. My first residence in this country, after a short time in New York City, I went to live in Pennsylvania, on a farm in Pennsylvania.

Q. Will you tell the court in as brief a manner as you can, where you have lived, and the jobs you have worked at in the intervening years from 1937 until the present time?

A. When I arrived on April 22, if I recall right, in 1937, in New York City, within three days, I filed a petition for naturalization, and then left New York City to work on a farm in Pennsylvania, Bucks County, Pennsylvania. I worked on that farm until September, 1937, when I entered Rutgers University, the State University of New Jersey, in a four-year college course in agriculture. During the years while I went to school, I worked on farms in New Jersey, Pennsylvania, Wisconsin, and South Carolina.

Q. In what capacity did you work?

A. As a farmhand.

[fol. 16] Q. Very well; go ahead.

A. In June, 1941, I graduated from Rutgers University with a B. S. in Agriculture, and spent one more summer on a farm in Wisconsin, working as a farmhand, and then entered the University of North Carolina in the fall of 1941, doing graduate work in Economics and Sociology. In December, 1942, I wound up my studies in Chapel Hill, North Carolina, at the University, and went back to work on a

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farm in Pennsylvania. Then I was asked to go into dairy herd improvement work; took a short course at Pennsylvania State College, and started working in April, 1943, in Virginia, and I worked for the Dairy Herd Improvement Association for eighteen months.

Q. What was that organization?

A. Dairy Herd Improvement Association under the supervision of the farm county agent of Charlottesville, Virginia. During the summer, during the late summer of 1944, I learned of the urgent need of the Mountain Mission School nearby in the Blue Ridge hills of Virginia. They needed more staff members to carry on the care of underprivileged children of the city slums of Virginia, mostly broken homes, children of broken homes, and I changed my work, occupation, and became an agricultural teacher and house father at that Mountain Mission school. I stayed there from September, 1944, until June 1945. I omitted to mention I was married in October, 1943, and in March, 1945, my first son was born in Charlottesville, Virginia, where I filed my first petition for final naturalization in Charlottesville, Virginia.

[fol. 17] Q. What happened to that?

A. I think the case was taken under consideration by the Supreme Court and the Department of Justice suspended all naturalization cases pertaining to the same—in the same field of the Girouard case until the Supreme Court had passed decision on it. So, in July, 1945, I went to work in the Mountain Mission School as an agricultural teacher. The School sent me as one of the representatives on a cattle trip to take cattle and horses to Poland under the auspices of the United Nations Relief and Rehabilitation Administration in February of 1946. That was relief work to carry livestock to Poland. On my return from that trip it was agreed upon that I should like to have my occupation at the school and continue to serve in the capacity as supervisor for the UNRRA on further trips to Poland. I made two more trips during 1946, and in August, 1946, I received an urgent request, if I were interested, to come to Sterling, Kansas, to teach in College, Sterling College. I accepted the offer and have been living in Sterling, Kansas, since September, 1946.

Q. Teaching in what school?

A. The Sterling College.

Q. That is where you are now employed?

A. That is where I am now employed. Soon after I came here, your Honor, I inquired what had happened to my petition for final naturalization, since the Girouard case had been handed down.

Q. Just a minute; let us do this by question and answer. Now, who did you marry in 1943?

A. Rebecca Jane Boone.

[fol. 18] Q. What nationality was she?

A. American.

Q. You are still married to her, and she is present in the courtroom at this time?

A. Yes, sir.

Q. Have you ever been convicted of a felony?

A. No, sir.

Q. Have you ever been charged with the commission of a felony?

A. No, sir.

Q. Have you ever been charged or convicted, either one, of any misdemeanor?

A. No, sir.

Q. Do you subscribe to the principles enunciated in the Constitution of the United States of America?

A. Yes, sir.

Q. Are you willing to renounce your allegiance to the German State?

— —

Q. Were you a citizen of Germany by birth?

A. I was, by birth.

Q. Do you agree to support and defend the Constitution and the Laws of the United States against all enemies, foreign, and domestic, and to bear true faith and allegiance to the same?

A. Yes, sir.

Q. Do you make that statement without any mental reservation?

A. Yes, sir.

Mr. Holmes: You may cross examine.

[fol. 19] Cross-examination.

By Mr. McCaul:

Q. Can you take an oath?

A. Yes, sir.

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Q. What?
A. Affirmation.
Q. Only an affirmation?

Mr. McCaul: We will get to the points that are the basis for the findings of the Immigration and Naturalization Service in this case. I think we can cover it most briefly by just calling to the attention of the court the questions and answers made October 21, 1947, at Lyons.

Mr. Holmes: Just a minute. Is it your intention to introduce that deposition in evidence?

Mr. McCaul: Well, I haven't yet. If you would like, we will.

Mr. Holmes: That is your side of the case.

Mr. McCaul: I will submit that this be accepted as evidence in the case.

A. May I ask a question?

Mr. McCaul: There is no objection?
Mr. Holmes: Go ahead.

(Whereupon a document was marked as Immigration Service Exhibit 1, by the Reporter.) (See Ab. pp. 29-36)

Mr. McCaul: To get it specifically before the court, there are a few things——

[fol. 20] Mr. Holmes: Just at this moment, let me ask some questions about this deposition to see if it is properly before the court.

Mr. McCaul: It would probably be proper on cross examination.

Mr. Holmes: Well, is the deposition before the court?

Mr. McCaul: It is now. It has now been introduced. You said you had no objection.

Mr. Holmes: No, I did not say that. I object to the introduction of the deposition.

Q. At the time you testified at Lyons on October 21, 1947, you were reminded that on April 9, 1947, at Hutchinson, Kansas, you testified before Examiner McCaul, and that you stated that you believed the existence of armed services were not necessary in a Christian Nation; is that correct?

A. That I stated that?

Q. Yes.

A. Yes, sir.

Q. That is your statement, and you stated on this date, October 21, 1947, that that statement was correct. The next question:

> "Q. Are you willing to have repealed all laws of the United States which provide for raising and maintaining the Armed Services of this Country?"

Your answer was "Yes." Was that question asked, and that answer given?

A. Yes, sir.

[fol. 21] Mr. McCaul: That is the idea—just to go over some of these things that are admitted.

Q. The question was asked:

> "Q. Are you an ordained minister?"

Your answer was "No". You added: "I am a member of the Society of Friends which has no ordained ministers." Was that question asked and the answer given?

A. Yes.

Q. Also the question:

> "Q. When you were questioned by Examiner McCaul on April 9, 1947, at Hutchinson, Kansas, as to what service you were willing to render in time of war you answered: 'any relief of suffering or any effort of a constructive nature which did not require entering the Armed Forces.' Will you explain in more detail what you mean by that answer?"

And your answer:

> "A. I am willing to perform any duty the Government requires of me in time of emergency which does not conflict with my Christian beliefs."

Was that question asked, and that answer given?

A. Yes sir.

Q. Then the Question:

> "Q. Is it your position that you cannot contribute in any way to armed forces for the purpose of rendering this country victorious in armed conflict for any cause whatever."

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[fol. 22] The answer:

"A. That is correct to this extent. I do not believe in this country engaging in armed conflict for any reason and I cannot contribute anything to be used solely and directly in furtherance of armed conflict."

Was that question asked and that answer given?

Q. This question—I will ask if this question was asked and this answer given:

"Q. Did it meet with your approval for the United States to send arms and munitions to Russia and England to be used in their efforts to destroy the German Army in the recent war?"

Answer:

"A. It did not. I was opposed to that."

Mr. Holmes: I object to that.

The Court: Overruled.

Q. Was that question asked and that answer given?

A. Yes.

Q. Was this question asked, and this answer given?

"Q. Are you willing to work in a munitions factory in time of war, and assist in the manufacture of munitions which are for the purpose of destroying the enemy forces whose aim is to destroy the armed forces of the United States?"

Answer:

"A. No."

[fol. 23] Was that question asked and that answer given?

A. Yes, sir.

Q. Now, here is a question and answer:

"Q. In the event it should be permissable in time of war for civilians to remove the wounded from the battlefield would you be willing to render service of this kind?"

Answer: A. "Yes."

Was that question asked and that answer given?

A. Yes, sir.
Q. Another question:

"Q. In the event it should be permissable in time of war for civilians to deliver ammunition to men at the front who were engaged in combat duty would you be willing to assist in delivering such ammunition to our fighting men?"

Answer: "A. No."

Was that question asked and that answer given?
A. Yes, sir.
Q. This question and answer:

"Q. Would you be willing to assist in the manufacture of atomic bombs for use in destroying an enemy of the United States?"

Answer: "A. No."

Was that question asked and that answer given?
A. Yes, sir.
[fol. 24] Q. Here is a question and answer:

"Q. Since you are willing to remove wounded from the battlefield as a civilian why do you object to doing the same work in uniform of the armed forces?"

Answer:

"A. I have to draw the line some place and I think I should refuse to wear the uniform for the reason that it is the symbol of secular authority over the authority of Jesus Christ. However, I would not object to wearing a uniform so long as I would not be required to be a member of the armed forces."

Was that question asked and the answer given?
A. Yes, sir.
Q. Question:

"Q. If you were a minister could you wear the uniform as a chaplain?

Answer:

"A. No, because chaplains are members of the armed services."

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Was that question asked and the answer given?
A. Yes.

Mr. McCaul: I am through cross-examining.

By the Court:

Q. Your sentiments are still the same today as they were when you answered those questions?
A. Yes, sir.

[fol. 25] By the Court:

Q. How old a man are you?
A. Thirty years old.
Q. Married?
A. Yes, sir.
Q. How many children?
A. Two children.
Q. How old are they?
A. Two years, and seven months, and three months.
Q. What part did you take in what was commonly known as World War Two; were you drafted?
A. Yes, sir—what do you mean by—I was subject to the law, and I appeared before the local draft board.
Q. What happened?
A. They recognized my conscientious objection to war on the basis of the Selective Service Act in 1940 and 1941, and gave me a 4-E classification, which is a conscientious objector, to object to participate in war and joining the armed forces of the country. The law provides for national work, work of national importance under the direction of the local draft board, wherever I went.

Recross Examination:

By Mr. McCaul:

Q. You don't mean to say under the direction?
A. Under the supervision.

Mr. Holmes: Your Honor please, we would like to complete the proffer of proof.
[fol. 26] The Court: All right.
Mr. Holmes: Unless they will admit the residence and if they will stipulate that the issue in this case, and the

commissioner's recommendation is based solely on the answers to these questions.

Mr. McCaul: Well, it is based on the statute, expressed in his answers to those questions.

Mr. Holmes: Those questions you just read to him?

Mr. McCaul: Do you want those made of record?

Mr. Holmes: That is correct. Yes.

Mr. McCaul: They are made a part of the record.

Mr. Holmes: I want to get correctly whether it is necessary to put on supporting witnesses in support of his testimony?

Mr. McCaul: This is a matter of conscience. He only can testify to it, and we haven't raised a question of character. We are not opposing him on the ground of character. It is this point of failing to show an attachment to the principles of the Constitution, as we think it means.

Mr. Holmes: Will you so stipulate then, to that statement you just made.

Mr. McCaul: He has it. I am bound by my statement, as far as my authority goes.

The Court: I want to ask some questions myself.

Q. Work that was acceptable would excuse you from service?

A. Exactly, sir.

[fol. 27] The Court: Anything additional?

Mr. Holmes: I believe, in view of the record, that the Government has stipulated that their only objection to his petition in the matter alleged therein has to do with the specific questions that have been asked on cross examination—that being the case, I believe I am safe in resting and that we have proven our points. If the court cares to hear argument in support of that, I am prepared to present it at this time, unless the Government has additional evidence that they want to offer in rebuttal.

The Court: It is necessary for this gentleman to become a citizen of the United States that he take the full oath, or affirmation?

Q. Now, in regard to the answers to the questions as submitted by the Naturalization Service. They have made an investigation, and they are coming into this court, recommending to this court that your application be denied.

A. Yes, sir.

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Q. And they are supposed to make this investigation without prejudice, to make it fairly, and from all of the information that they can obtain, or that they have obtained about you, aren't they?

A. Yes.

The Court: This court would be inclined to follow the recommendation as set forth by the representatives of the Federal Naturalization Service.

Mr. Holmes: Would counsel for the petitioner be permitted to cite to this court authority which is contrary to [fol. 28] the position the Immigration Service has taken?

The Court: Yes.

H. A. KELSEY, called as a witness on behalf of the petitioner, having been first duly sworn according to law, on oath testified as follows:

Direct examination.

By Mr. Holmes:

Q. Will you state your name and position to the court?

A. H. A. Kelsey.

Q. What is your profession?

A. President-Emeritus of Sterling College.

Q. Are you acquainted with the petitioner in this case, Martin Ludwig Cohnstaedt?

A. I am.

Q. Under what circumstances and for how long have you known him?

A. Since August, 1946.

Q. Have you heard the testimony that he gave in this hearing immediately prior to your taking the stand?

A. Yes.

Q. Are you familiar with the position that he takes in regard to the answers asked on cross examination by the Immigration Examiner?

A. I am.

[fol. 29] Q. Is it your opinion that he is sincere and conscientious in making those answers?

A. I believe so, yes, sir.

Q. Do you consider that his position which is disclosed by those answers is taken from his religious beliefs?

A. Yes, that is it.

Q. Do you know him to be of good moral character?

A. Yes, sir.

Q. And to reside in Sterling, Kansas?

A. Yes, sir.

By the Court:

Q. You have known him since August, 1946?

A. Yes, I have been in correspondence with him.

Q. You have seen him how often since that date, about?

A. Once a week, possibly.

Q. Have you ever heard anything discussed in regard to his morals or habits, or anything of that sort?

A. No.

Q. Neither one way or the other, have you?

A. Well, he has a positive Christian influence in the community, if that is what you mean.

By Mr. Holmes:

Q. You are the man who hired him to teach at Sterling, at the time you were president?

A. Yes.

[fol. 30] Q. You believe he is attached to the principles of the Constitution of the United States?

A. There is no reason to doubt it. I certainly wouldn't have employed him if I had.

Q. Do you know his reputation in the community?

A. Yes.

Q. What is that reputation?

A. It is very good.

The Court: That is, you mean by that that he has a good reputation for obeying the laws, staying sober, probably, telling the truth, and paying his bills?

A. Yes, and he takes part in the activities of the community which are constructive.

Cross-examination.

By Mr. McCaul:

Q. You heard his testimony a while ago?

A. Yes.

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Q. Do you agree with him that you would be willing to have all the laws providing for armed defense of this country repealed?

A. No, sir.

Mr. Holmes: To which we object as not being an issue in this case.

The Court: Overruled.

A. I don't agree with him.

Q. Do you think his objection to wearing the uniform of one of the armed forces in a noncombatant capacity is justified?

[fol. 31] Mr. Holmes: I make objection to this line of questioning.

The Court: I don't believe that will be necessary. I think I understand the gentleman's position, Mr. McCaul.

(Witness excused.)

Frank C. Richard, called as a witness on behalf of the petitioner, having first been duly sworn according to law, on oath testified as follows:

Direct examination.

By Mr. Holmes:

Q. State your name and occupation?

A. Frank C. Richard, minister.

Q. Of what denomination?

A. Congregation Christian Church.

Q. Where do you hold a pastorate?

A. Partridge, Kansas, and for the Kansas State Reformatory.

Q. The Kansas State Reformatory at Hutchinson?

A. Yes.

Q. Are you acquainted with this petitioner, Martin Cohnstaedt?

A. I am.

Q. Under what circumstances have you become acquainted with him?

A. He came to my office about last March for some help in the Institute of Rural Life.

[fol. 32] Q. What is the Institute of Rural Life?

A. A conference on Rural Life work out at Sterling.

Q. What has been the nature of your association with him since that time?

A. I assisted in the planning of the next Institute, met with the committee, and have met him several times in between, planning the Rural Life work.

Q. Do you consider that you know him fairly intimately?

A. As intimately as is possible within a brief time. I have been associated with him in this work.

Q. Now, this Rural Life Association is primarily a religious or secular organization?

A. It is neither secular nor religious. It isn't one or the other.

Q. I don't quite understand the nature of the organization?

A. It is simply an institute in the interests of the rural life work, both religious and secular, whatever you want to call it.

Q. Now, you heard the petitioner testify on the stand, immediately prior to your taking the stand?

A. I did.

Q. Do you consider that you know the petitioner well enough to judge whether or not he is sincere in making the answers to those questions he was asked on cross examination?

A. I think so.

Q. Do you know his reputation?

A. Only since I have become acquainted with him.

[fol. 33] Q. State to the court what that reputation is?

A. I have known him as a man who is very much interested and vitally interested in the constructive forces of the community in rural life work, and economics, and Christian idealism.

Q. Is he considered of a high moral character by the community, as you observed?

A. In so far as I know.

Q. How far is that?

A. Well, he lives in Sterling.

The Court: I think he has told you that.

Mr. Holmes: Very well.

Mr. McCaul: There is no question by the examiner.

(The Witness was excused.)

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(Whereupon, the court announced that the attorney for the petitioner would be given ten days' time, after the furnishing of a transcript by the Reporter, to file a brief with the court, at which time the matter would be passed upon without further hearing.)

* * * * * * *

Immigration Service Exhibit 1

K. C. File No. 1100-13011

Statement under affirmation of Martin Ludwig Cohnstaedt on October 21, 1947, At Lyons, Kansas, before Michael McCaul, U. S. Naturalization Examiner:

Examiner to Alien:

[fol. 34] Q. You are advised that I am a Naturalization Examiner of the Immigration and Naturalization Service, Department of Justice, and as such I am authorized by law to hear your sworn testimony pertaining to your qualifications for naturalization. Any statement you may make may be held against you in any action civil or criminal. Are you willing to testify?

A. (Affirmed.)

Q. Are you the same person who filed petition for naturalization No. 480 on May 13, 1947, at Great Bend, Kansas?

A. Yes.

Q. On April 9, 1947, at Hutchinson, Kansas, you testified before me and you stated that you believed the existence of Armed Service is not necessary in a Christian nation. Is that correct?

A. Yes.

Q. Are you willing to have repealed all laws of the United States which provide for raising and maintaining the Armed Services of this Country?

A. Yes.

Q. Are you an ordained minister?

A. No. I am a member of the Society of Friends which has no ordained ministers.

Q. When you were questioned by Examiner McCaul on April 9, 1947, at Hutchinson, Kansas, as to what service you were willing to render in time of war you answered: "Any relief of suffering or any effort of a constructive

[fol. 35] nature which did not require entering the Armed Forces." Will you explain in more detail what you mean by that answer?

A. I am willing to perform any duty the Government requires of me in time of emergency which does not conflict with my Christian beliefs.

Q. Is it your position that you cannot contribute in any way to armed forces for the purpose of rendering this country victorious in armed conflict for any cause whatever?

A. That is correct to this extent. I do not believe in this country engaging in armed conflict for any reason and I cannot contribute anything to be used solely and directly in furtherance of armed conflict.

Q. In time of war would you be willing to render any and all services for which you may be physically able to render in furtherance of the war effort of the United States which would not necessitate the wearing of the uniform of one of the armed forces and which would not necessitate the bearing of arms?

A. Only as qualified in my answer to the question next above.

Q. Did it meet with your approval for the United States to send arms and ammunitions to Russia and England to be used in their efforts to destroy the German Army in the recent war?

A. It did not. I was opposed to that.

Q. Are you glad Germany was defeated in the recent war?

A. I was opposed to Nazism in Germany from its inception and I would be pleased if Germany were freed from it but I do not believe it has been nor has it been benefitted [fol. 36] directly in any way by the war. I also believe the United States has lowered its resistance to Nazi influence because of having expended its energies in an attempt to resist Nazism by armed force.

Q. Are you willing to work in a munitions factory in time of war, and assist in the manufacture of munitions which are for the purpose of destroying the enemy forces whose aim is to destroy the armed forces of the United States?

A. No.

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Q. What, if anything, did you do or try to do in furthering the war effort of the United States during the recent war?

A. Whatever I did would be beneficial in time of peace as well as in time of war and if my work furthered the war effort it was purely incidental and not because I intended to further the war effort. My work was teaching agriculture, testing butter fat and working in UNRA which work was at all times of national importance and acceptable to my draft board.

Q. In the event it should be permissible in time of war for civilians to remove the wounded from the battlefield would you be willing to render service of this kind?

A. Yes.

Q. In the event it should be permissible in time of war for civilians to deliver ammunition to men at the front who were engaged in combat duty would you be willing to assist in delivering such ammunition to our fighting men?

A. No.

[fol. 37] Q. Would you be willing to assist in the manufacture of atomic bombs for use in destroying an enemy of the United States?

A. No.

Q. Since you are willing to remove wounded from the battlefield as a civilian why do you object to doing the same work in uniform of the armed forces?

A. I have to draw the line some place and I think I should refuse to wear the uniform for the reason that it is the symbol of secular authority over the authority of Jesus Christ. However, I would not object to wearing a uniform so long as I would not be required to be a member of the armed forces.

Q. If you were a minister could you wear the uniform as a chaplain?

A. No because chaplains are members of the armed services.

(S.) Martin L. Cohnstaedt.

Subscribed and affirmed to me before me this 21st day of October, 1947. (S.) Michael McCaul, Naturalization Exam.

Certificate of Counsel

The foregoing is a true and correct abstract of testimony in the case necessary to a determination of the questions involved.

Laurence S. Holmes, Counsel for Petitioner.

[fol. 38] In the Supreme Court of the State of Kansas

No. 37531

In the Matter of the Petition of Martin Ludwig Cohnstaedt for Naturalization

Appeal from the District Court of Barton County, Kansas,

The Honorable Roy J. McMullen, Judge

Supplemental Abstract of Appellant

Specifications of Error

1. The order of the Court denying the Petition for Naturalization on June 23, 1948. (See page 5 of Abstract).

2. The order of the Court on August 18, 1948, overruling the Motion for Judgment in Accordance with the Court's Finding of Fact and Conclusions of Law. (See page 6 of Abstract)

3. The overruling of the Court on August 18, 1948, of the Appellant's Motion For a New Trial. (See page 6 of Abstract)

Certificate of Counsel

The foregoing is a true and correct Supplemental Abstract in the above entitled case.

Laurence S. Holmes, Counsel for Petitioner.

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[fol. 39] IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 37531

In the Matter of the Petition of MARTIN LUDWIG COHNSTAEDT for Naturalization, Appellant,

vs.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES DEPARTMENT OF JUSTICE, Appellee

Counter Abstract of Appellee

In the District Court of Barton County, Kansas

Form 25 1133

ORDER ESTABLISHING RULE DAYS

Order establishing rule days for the hearing of petitions for naturalization in the District Court for Barton County, at Great Bend, Kansas.

In conformity with the terms of Section 6 of the Naturalization Act of June 29, 1906, 34 U. S. Stat. L., 596, the following days are fixed as stated days for the hearing of petitions [fol. 40] for naturalization in the District Court for Barton County, at Great Bend, Kansas, on which dates, and no other, final action will be taken on applications for citizenship in this court. All rules heretofore existing fixing dates for final hearings in naturalization cases are hereby abrogated:

The 1st Day of the June and November terms, being the 1st Tuesday in June and the 3rd Tuesday in November, of each year, respectively, all petitions being subject to call at 10:30 A. M.

Immediately following the filing of each and every petition for naturalization, the Clerk of this Court shall post the same for hearing to the first rule day that will admit of at least ninety days posted notice being given the public, and will, at the time, inform the applicant and his witnesses of the date of such final hearing.

Each and every applicant for citizenship shall, as a matter of right, be entitled to one continuance in his case, but in the event he fails to prosecute his case to a final hearing on the second hearing day, said petition shall, without further notice to said applicant, be forthwith dismissed for

non-prosecution. Continuances shall be from rule day to rule day.

The Clerk of Court shall enter this rule of record, and will transmit a copy thereof to the Naturalization Service, 410 Custom House, St. Louis, Missouri, for its files.

Done this 11 day of September, A. D. 1925.

(S.) Ray H. Beals, Judge Presiding.

[fol. 41] CERTIFICATE OF COUNSEL

The foregoing is a true and correct Counter Abstract in the above entitled case.

V. J. Bowersock, Assistant United States Attorney, District of Kansas, Topeka, Kansas, Attorney for Appellee.

[fol. 42] IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 37,531

In the Matter of the Petition of MARTIN LUDWIG COHNSTAEDT for Naturalization, Appellant,

v.

IMMIGRATION AND NATURALIZATION SERVICE OF THE UNITED STATES DEPARTMENT OF JUSTICE, Appellee

OPINION—June 11, 1949

Syllabus by the Court

1. Following Girouard v. United States, 328 U. S. 61, 66 S. Ct. 826, 90 L. Ed. 1084, it is held that an alien who is willing to take the oath of allegiance and to serve in the army as a noncombatant, but who, because of religious scruples, is unwilling to bear arms in defense of this country, may be admitted to citizenship.

2. A petitioner whose evidence disclosed that in time of war he would not willingly work in a munitions factory and assist in the manufacture of munitions for the purpose of destroying enemy forces whose aim it would be to destroy the armed forces of the United States, nor would he deliver ammunition to men at the front who were engaged in combat duty, is not entitled to be admitted to citizenship.

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3. The record examined, and *held*, the trial court did not err in refusing to admit the petitioner to citizenship in the United States.

Appeal from Barton district court; Roy J. McMullen, judge. Opinion filed June 11, 1949. Affirmed.

[fol. 43] Laurence S. Holmes, of Wichita, argued the cause and was on the briefs for the appellant.

V. J. Bowersock, assistant United States attorney, district of Kansas, argued the cause, and Lester Luther, United States attorney, district of Kansas, was with him on the briefs for the appellee.

[fol. 44] The opinion of the court was delivered by

Thiele, J.: Martin Ludwig Cohnstaedt, hereafter referred to as the petitioner, filed his petition in the district court of Barton County, Kansas, to become a naturalized citizen of the United States. The prayer of his petition was denied and he perfected his appeal to this court.

In a preliminary way it is observed that under article 1, section 8, of the Constitution of the United States, the Congress shall have power to establish "an uniform Rule of Naturalization" and that it has done so, by an act which provides that a person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed and not otherwise (U.S.C. Title 8, § 701 [b]) and that petitions for naturalization may be filed and shall be docketed the same day as filed, but that final action thereon shall be had only on stated days to be fixed by the rule of the court (U.S.C. Title 8, § 732 [d]). Under previous like statutes the rule of the Barton county district court fixed the first days of the June and November terms, being the first Tuesday in June and the third Tuesday in November in each year as the days for hearing petitions for naturalization and on which dates, and no others, final action would be taken on applications for citizenship.

On May 13, 1947, the petitioner filed his petition and was later examined by an official of the naturalization service, who found that petitioner should not be naturalized. Later, and on November 18, 1947, which was the day fixed by the rule, a hearing was had, at which time the government's adverse recommendation was filed and petitioner and his [fol. 45] witnesses testified, and petitioner was given leave to file a brief, and that was done. On February 28, 1948, which was not a rule day, the trial judge filed a written

memorandum or decision that under the authority of Girouard v. United States, 328 U. S. 61, 66 S. Ct. 826, 90 L. Ed. 1084, petitioner should be admitted to citizenship upon taking the oath. On June 21, 1948, the petitioner filed his motions for judgment and on June 23, 1948, the trial court entered its order denying the petition for naturalization. Petitioner's motion for a new trial was denied, and he filed his notice of appeal.

Petitioner makes some contention that the ruling or decision of the trial court of February 28, 1948, was a final order, and not having been appealed from became a finality, and our attention is directed to certain of our decisions, which need not be reviewed, for they are not in point here. While it is true that jurisdiction to confer citizenship through naturalization proceedings is conferred upon the state court (U.S.C. Title 8, § 701), the procedure to be followed is that fixed under that act. The Barton county district court had fixed rule days on which dates and no others, final action would be taken on applications for citizenship. The decision of February 28, 1948, was not on such a date and cannot be given the finality which the petitioner seeks to attribute to it.

Petitioner's principal contention, as stated by him, is that he submitted sufficient evidence to the trial court to show that he is attached to the principles of the United States Constitution; that he is a person of good moral character; that he has met all of the requirements of citizenship and his petition should have been granted, and his brief is [fol. 46] devoted to a development of that contention, our attention being directed to the evidence and to certain decisions of the Supreme Court of the United States. At the oral argument petitioner made it clear that he was relying upon the principles laid down in Girouard v. United States, supra, and he conceded that if his evidence did not meet the test set forth in that case the judgment of the trial court should be affirmed.

Prior to 1946 the Supreme Court of the United States had held that an alien who refused to bear arms would not be admitted to citizenship. See United States v. Schwimmer, 279 U. S. 644, 49 S. Ct. 448, 73 L. Ed. 889; United States v. MacIntosh, 283 U. S. 605, 51 S. Ct. 570, 75 L. Ed. 1302; and United States v. Bland, 283 U. S. 636, 51 S. Ct. 569, 75 L. Ed. 1319. In an opinion handed down

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in 1946, however, that court in Girouard v. United States, reconsidered the question, held that the three cases noted above did not state the correct rule of law, which in substance is that an alien who is willing to take the oath of allegiance and to serve in the army as a non-combatant, but who because of religious scruples is unwilling to bear arms in defense of this country, may be admitted to citizenship.

Petitioner contends his evidence showed him to have met the test of the last mentioned case. Assuming that his evidence is to be fully credited, it showed the following. Petitioner was born in Germany in 1917, went to England in 1934, came to the United States in 1937, attended various schools in the United States and since 1946 has been a teacher in Sterling College at Sterling, Kansas. Testimony as to petitioner's character and reputation need not be detailed. [fols. 47-49] On his direct examination petitioner stated he subscribed to the principles enumerated in the Constitution of the United States, and that he agreed to support and defend the Constitution and laws against all enemies and to bear true faith and allegiance to the United States, and that he made such statements without mental reservations. On cross-examination, a verified statement containing questions asked by an official of the naturalization service and petitioner's answers was introduced into the record and petitioner was examined with respect thereto. No purpose will be served by detailing this examination. Summarized, petitioner stated he believed the existence of armed services was not necessary in a Christian nation, and that he was willing to have repealed all laws providing for armed services; that he was not an ordained minister but was a member of the Society of Friends; that he was willing to perform any duty which the government required which did not conflict with his religious beliefs, but that he could not contribute anything to be used solely and directly in furtherance of armed conflict; that he was opposed to sending arms and ammunition to our allies in the recent war; that he was not willing to work in a munitions factory in time of war and assist in manufacture of munitions for the purpose of destroying enemy forces whose aim would be to destroy the armed forces of the United States; that in event of war, if it should be permissible for civilians to remove the wounded from a battlefield he would do so, but he would

not deliver ammunition to men at the front who were engaged in combat duty. Other evidence need not be noted.

We think the above makes it clear that petitioner is not willing to serve in the army as a non-combatant, and that he is not entitled to be admitted to citizenship; that the trial court did not err in so concluding, and that its judgment should be and it is affirmed.

[fol. 50] IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 37531

In the Matter of the Petition of MARTIN LUDWIG COHNSTAEDT for Naturalization

Appeal from the District Court of Barton County, Kansas

The Honorable Roy J. McMullen, Judge

APPELLANT'S MOTION FOR RE-HEARING—Filed July 1, 1949

The Appellant-Petitioner, Martin L. Cohnstaedt, respectfully moves this Court for an order granting a rehearing on this cause for the reasons set out hereafter.

I

In support of this motion for rehearing and on the procedu-al point, (See Appellant's Brief, p. 37 et seq.) this Court declared that "final" action on a naturalization case could only be taken on stated days as fixed by the rule of the lower Court. Now a glance at the rule of Judge Beals, (See Appellee's Counter Abstract, p. 2), made on September 11, 1925, provided that the first day of June and November terms should be the day on which all final actions on applications for citizenship would be taken. But the 1943 legislature changed the beginning days of the terms of the District Court of Barton County so that the November terms started on the first Monday of November, (See 1947 Supp. G.S. 20-1020). Thus under Judge Beals' rule one of the proper days for naturalization cases to be finally acted on in 1947 would have been on November 3, 1947, instead of November 18 when this Petitioner was notified by the Immigration Service of the United States Department

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[fol. 51] of Justice to appear before the lower Court for his final hearing.

This Petitioner-Appellant suggests that the language used by the Court in its opinion as it now stands would jeopardize every decree of naturalization granted by the Barton County District Court under its mistaken calculation of the application of the "Nationality Rule day" of Judge Beals' order, or contrarywise that the Barton County District Court had jurisdiction of the parties and subject matter and exercised its judicial power over it by hearing evidence, taking the matter under advisement and deciding the basic issue, (See Appellant's Abstract, p. 4). This latter position, the Petitioner-Appellant suggests, is the better rule of law, for fundamental to our Anglo-Saxon system of jurisprudence is the doctrine of finality of judgment —there must be an end to litigation. Certainly this Petitioner has demonstrated in his brief that the lower Court's order and findings of February 28, 1948, was an appealable order and final in that sense (in the sense that that term is used in our Kansas procedural acts. See Appellant's Brief, pages 36, 37, 38, 39, and 40.) for certainly at that time the United States Department of Justice could have sought Appellant review.

The Restatement of the Law of Judgments of the American Law Institute, Sections 1, 2, and 3, dealing with personal judgments, judgments in rem, and judgments quasi in rem, all state the rule that "Where a reasonable opportunity has been afforded to the parties to litigate a claim before a court which has jurisdiction over the parties and the cause of action, and the court has finally decided the controversy, the interests of the State and of the parties require that the [fol. 52] validity of the claim and any issue actually litigated in the action shall not be litigated again by them." Notice particularly Comment a. under Section 1. of the Restatement. Comment d. under Section 1. points out that this rule is applicable only if a final judgment is rendered in the original action.

Section 41 of Judgments in the Restatement read as follows: "The rules of res judicata are not applicable where the judgment is not a final judgment." Comment a. thereunder states, "For the purposes of the rules stated in this Subject a judgment at law is not a final judgment if further

judicial action by the court rendering the judgment is required to determine the matter litigated . . . ".

If these principles as set forth in the Restatement of the law of judgments are applied by this Court to the issues raised by the Petitioner rightly or wrongly, then the lower Court decided all of the issues of law and fact in this case in its order of February 28, 1948, (See Appellant's Abstract, p. 4), and since this was not appealed from by the unsuccessful party within the statutory time the order must stand. (See Appellant's Brief, pages 37, 38, 39, 40 and 41.)

Further this Petitioner-Appellant wishes to point out that "final action" as the term is used in the 1940 Nationality Act, (United States Code, Title 8, 732, (d)), would be the swearing in or refusing to swear in a naturalization petitioner, but does this mean that a naturalization Court could not take the matter under advisement and pass on all the issues of law and fact irrevocably in the interval between "rule days"? The Petitioner submits that this is not the correct rule of law.

[fol. 53] II

In support of this motion for rehearing and concerning the substantive law of this case—namely the application of the Girouard case, 328 U. S. 61, to the facts of the one at bar, this Petitioner-Appellant asserts that if the Girouard case reversed the principles set forth in the Rosa Schwimmer decision than it certainly means that Martin Cohnstaedt is a suitable person to become a citizen. It is important to notice that footnote of the dissenting opinion of Justice Stone contained in that opinion (See 90 L. Ed., page 1092, or 66 Supreme Court, p. 831.) This note reads as follows: "In the opinion of the writer there was evidence in United States v. Schwimmer, 279 U. S. 644, 49 S. Ct. 448, 73 L. Ed. 889, from which the district court could and presumably did infer that applicants behavior evidenced a disposition, present and future, actively to resist all laws of the United States and lawful commands of its officers for the furthering of any military enterprise of the United States, and actively to aid and encourage such resistence in others, and this the district court presumably concluded evidenced a want of attachment of the applicant to the principles of the Constitution which the naturalization law requires to

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be exhibited by the behavior of the applicant preceding the application for citizenship.

See also the portion of the majority opinion by Justice Douglas, in which he points out that the naturalization oath is substantially the same as all public officials take—Federal and State. Martin Cohnstaedt would be competent to take such an oath.

The Petitioner-Appellant wishes to point out that the distinction made by the Kansas Court here is the same as [fol. 54] saying that only the MacIntosh, 283 U. S. 605, and Bland, 283 U. S. 636 decisions were reversed by the Girouard decision, supra. This is contra to the express language in the Girouard decision. (See Appellant's Brief, p. 51). Rosa Schwimmer said, "I am an uncompromising pacifist—I am willing to do everything that an American citizen *has* to do except fighting—I am not willing to bear arms, etc. . . ." Now certainly there is no evidence contained in the answers that Martin Cohnstaedt gave in the trial of this case that indicates he would refuse to do anything required by the United States laws of him, but as was pointed out in the Petitioner-Appellant's original Brief (See Petitioner-Appellant's Brief, pages 52, 53 and 54).

The Circuit Court of Appeals for the 7th Circuit in the case of Schwimmer v. United States, 27 Federal Reporter, 2nd Serie, which ruled on the Schwimmer case before the United States Supreme Court did, details at some greater length the position that Rosa Schwimmer took. In concluding the Court says that Rose Schwimmer should have been admitted to citizenship:

"Women are considered incapable of bearing arms, Male persons of the age of appellant have not been compelled to do so. Appellant, if admitted, cannot by any present law of the United States be compelled to bear arms. Judging by all of the conscription acts of which we have knowledge, she never will be required to do so; yet she is denied admission to citizenship because she says she will not fight with her fists or carry a gun.

"In other words, there is put to her an hypothetical question—what would she do under circumstances that never have occurred and probably never will occur—and upon [fol. 55] her answers to this supposed case her petition is denied. A petitioner's rights are not to be determined by putting conundrums to her.

"The views of appellant relied upon to support the denial of her application have no substantial relation to the inquiry authorized by the statute. They were immaterial to that inquiry and do not furnish sufficient basis for the decree.

"Reversed and remanded, with direction to grant appellant's petition."

Yet the Rosa Schwimmer Supreme Court opinion has been specifically overruled. (See the Girouard case supra.)

Similarly Martin Cohnstaedt had a number of conundrums proposed to him as to how he would act in situations that have as yet not existed within the laws of the United States.

The one all pervading question that this Petitioner-Appellant desires to ask this court is—how, in the light of various facts and beliefs, in the doctrine of pacifism disclosed in the Schwimmer, Bland, MacIntosh, and Girouard cases, can this court say that only potential members of the Armed Forces, either combatant or non-combatant, are entitled to become United States citizens when the laws of Congress recognize and have for sometime the fact that there are certain religious minority groups of its own citizens whom it will not compel, though it may have the power to do so, to fight in its Armed Forces, and that it has not deemed it politically wise to attempt a labor draft even at the height of World War II?

[fol. 56] Therefore this Petitioner-Appellant respectfully suggests that this Court should grant a rehearing on the issues in his case.

Martin Ludwig Cohnstaedt. By Laurence S. Holmes, his Attorney, Orpheum Building, Wichita, Kansas.

DENIAL OF REHEARING—July 8, 1949

By the Court:

July 8, 1949—Denied.

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

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[fol. 58] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 5, 1949

The petition herein for a writ of certiorari to the Supreme Court of the State of Kansas is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas and Mr. Justice Clark took no part in the consideration or decision of this application.